Supreme Court, U.S.
FILED

98 1792 MAY 5 - 1999

OFFICE OF THE CLERK

NO.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1998

DONALD R. WASHINGTON, **Petitioner,**

v.

WASHINGTON METROPOLITIAN AREA
TRANSIT AUTHORITY **Respondents**

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS
FOR THE DISTRICT OF COLUMBIA

PETITION FOR WRIT OF CERTIORARI

DONALD R.WASHINGTON
PRO SE

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2088

QUESTIONS PRESENTED FOR REVIEW

1. Does a plaintiff have the right to invoke that the rights be in granted under Certificate of Assurance that is sworn to and signed by the General Manager and Head of the General Council of Washington Metropolitan Area Transit Authority in front of U.S. Congress annually.

2. May a plaintiff who solely does transit work be consider a Federal Transit worker and subject the protection benefits afforded Federal Grant recipients

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U.S. Court of Appeal for District of Columbia

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JURISDICTION

The Court of Appeals issued its oppion on December 1, 1998, and denied Petitioner's petition for rehearing and suggestion for rehearing en banc on January 6, 1999. This petition is being filed after a 30 days extended time as required by S. Ct. R. 30.2. This Court has Court has jurisdiction pursuant to 28 U.S.C.§. 1254 (1). This petition is not a cross-petition and Petitioners does not rely on S. Ct. R. 125.

CONSTITIONAL PROVISION

Constitutional Provision the right to be free from cruel and unusual Punishments Inflicted. Nor shall any person be deprived of life, Liberty or Property with out Due Process of Law and one has the right to be fairly heard and not shock the sense of fair play,

STATEMENT OF CASE

This case stems from numerous forms of continuing discrimination. The petitioner was called into an office, demoted from second level management /supervisor positions to mechanic with absolutely no due process. A demotion form upper level management to Union Mechanic is the evaluation of being fired. There was no discussion of employee rights, There were no postings of Federal guidelines of employee rights and the personnel department did not meet with the petitioner.

The petitioner then filed and internal complaint with Washington Metropolitan Area Transit Authority's (WMATA) Equal Employment Office (EEO), It took WMATA more than two hundred, eleven (211) days to respond to the petitioners' administrative complaint. WMATA has not shown anything that resembles a two-hundred (200) day report. There was no hearing, any investigative sessions where the petitioner was present or has knowledge of. The petitioner received no copy of such report. The petitioner received a letter in the mail stating a finding that no Probable Cause had been rendered form the Director of Civil Rights (WMATA). Also, stated in the letter if petitioner was dissatisfied with the decision a complaint could be filed the Equal Employment Opportunity Commission (EEOC) Washington Field Office no later than one hundred eighty (180 days) from the date of the last alleged incident.

Director of Civil Rights –WMATA. Willfully and proposal held information on filing complaint with EEOC for two-hundred twelve days (212), making sure the 180 days filing time had expired.

Petitioner went to EEOC and was issued a valid Right to Sue letter. The District Court agreed with WMATA who claimed they were a state agency and had nothing to do with the Federal Government. This was not true; due to

the billions of dollars WMATA received from the U.S. Congress annually.

WMATA also seems to forget the Congress (Certificate of Assurance) which is binding and signed by the WMATA General Manager and head of General Council. WMATA failed to follow its won Personnel Policies, EEO procedures, Urban Mass C4704.1, C7R29, Federal Transit Administration Certification and Assurance Act.
The petitioner is a FTA worker who has worked salary on Mass Transit projects, therefore, a Federal employee.
The Petitioner requests the Honorable Court to issue Writ of Certiorari WMATA have deprived the Petitioner of due Process.

The U.S. Cont. of Appeals also errer when they found in WMATA favor. WMATA states we are not an Agency. They are an agency and in named so n UMTAC. 4704.1. The Petitioner is entitled to equitable tolling do to the holding his complaint for over 211 days and had no posting as required by regulations. WMATA has been given regulations to follow under FTA, WMATA and fundamental fairness as a grant recipient. The Petitioners got no help within WMATA General Manager and staff gave him the run around, personnel referred to meet him and the Board Members did nothing.

CONCLUSION

For all the reasons set forth above Donald R. Washington respectfully request that this Court grants a Writ of Certiorari.

APPENDIX A

UNTIED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIAL CIRCUIT

Argued October 9, 1998 Decided December 1, 1998

NO. 97-7227

DONALD WASHINGTON,
APPELLANT

V.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
APPELLEE

Appeal from the United States District Court
For the District of Columbia
(No. 97cv00726)

Barbara B. Hutchinson argued the cause and filed the briefs for appellant.

Nancy F. Langworth argued the cause for appealed. With her on the brief were *Robert L. Polk* and *Robert J. Kniaz*

Before: Edwards, *Chief Judge*, ROGERS and GARLAND *Circuit Judges.*

Opinion for the Court filed by *Chief Judge* Edwards.

Bills of cost must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of cost out of time

Edwards, Chief Judge: This case involves the timeliness of a discrimination claim filed by Donald Washington against the Washington Metropolitan Area Transit Authority ("WMATA"). Washington raises various arguments as to why this court should permit him to proceed on his claim, notwithstanding his failure to satisfy a clear filing requirement with the Equal Opportunity Commission ("EEOC"). We find Washington's Contentions to be without merit. Accordingly, we affirm the District Court's grant of summary judgment in favor of WMATA.

I Background

On March 31, 1975, Washington began his employment with WMATA. He was hired for the position of Mechanical Electrical Repairman and was subsequently promoted to a supervisory position. According to Washington, however he began to experience discriminatory treatment by WMATA beginning in 1990. See Complaint 6, reprinted in Joint Appendix ("J.A") 6. This alleged treatment consisted of inter alia unfair promotion practices, "bogus" unfavorable performance evaluations, and temporary re-assignments. See id 6-9, 11-13, reprinted in J.A. 6-8. The treatment allegedly worsened after Washington complained of discrimination to his supervisors. See Affidavit of Donald Washington reprinted in J.A. 74. On August 8, 1995, Washington was demoted to a non-supervisory position.

On September 5, 1995, Washington filed an internal complaint of discrimination with WMATA's Office of Civil Rights ("OCR"), claiming age and race discrimination and relations in the terms and conditions of his employment, including his demotion. See J.A. 84-88. On April 12, 1996, WMATA issued an internal decision, finding that there was " insufficient evidence to support a charge of discrimination." Letter from WMATA to Washington (April 12, 1996), reprinted in J. A. 89. While noting that the decision was "final with in WMATA" the OCR's letter informed Washington that he could file a complaint with the EEOC "no later that in 180 days from the date of the last alleged incident." Id. Five months

later, on September 12, 1996, Washington filed a race discrimination charge against WMATA with the EEOC. See J.A. 34. He amended this charge on January 6, 1997 to include claims of age discrimination and retaliation, as he had originally alleged to the OCR. See id. In April 1997, Washington requested and received a right-to-sue notice from the EEOC.

On April 11, 1997, Washington filed suit in District Court, alleging violations of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. 621-634, and Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. 2000e to 2000e-17. On September 19, 1997, WMATA filed a Motion to Dismiss and /or for Summary Judgement, arguing that: (1) because the last-alleged discriminatory act –the demotion—occurred more than 180 days before Washington filed his charged with the EEOC, his compliant was time barred under 29 U.S.C. 626(d)(1) and 42 U.S.C. 2000e-5 (e)(1), see J.A. 24-27; and (2) the court nevertheless lacked jurisdiction over the ADEA claim because of WMATA's Eleventh Amendment immunity issue, the District Court granted WMATA's motion, concluding that Washington claim was untimely and that equitable tolling was not appropriate . See Washington v WMATA, NO 97-0726, Memorandum and Order (D.D. C. Nov. 17, 1997), reprinted in J.A. 1-3

II Analysis

Before suing under either the ADEA or Title VII, an aggrieved party must exhaust his administrative remedies by filling a charge of discrimination with the EECOC with 180 days of the alleged discriminatory incident. See 29 U.S.C. 626 (d)(1) (1994); 42 U.S.C. 2000e-5(e)(1) (1994); Currier v. Radio Free Europe/Radio Liberty, Inc. NO. 98-7020, 1998 WL 785623, at *2(D.C. Cir Nov 13, 1998). Washington, however, did not file his charge with the EEOC until more than a year after his allegedly discriminatory demotion.

Washington's first argument is that his September 5, 1995 internal complaint should be "considered filed with the EEOC on the date it was filed with WMATA". Brief of

Appellant at 4. For this argument, Washington relies on EEOC regulation entitled, "Procedures for Complaints of Employment Discrimination Filed Against Recipient of Federal Financial Assistance," see 29 C.FR. pt. 1691 (1998), which provided in pertinent part, that:

> A compliant of employment discrimination filed with an agency, which is transferred or referred to EEOC under this regulation, shall be deemed a charge received by EEOC. For all purposes under title VII ..., the date such a compliant was received by an agency shall be deemed the date it was received by EEOC.

29 C.F.R. 1691. 6(a). WMATA, however is not an "agency" within the meaning of this provision. "Agency," for these purpose, means "any Federal department or agency which extends Federal financial assistance subject to any civil rights provision(s) to which this regulation applies." 29 C.F.R. 1691.13 (a). This definition clearly excludes WMATA, which is neither a federal department, nor an agency that extends federal financial assistance. Thus, WMATA's internal procedures offer a separate forum for pursuing discrimination complaints, which does not displace the ADEA or Title VII filling requirements.

Washington next argues that, even if he did not satisfy the filling requirement, the time for filing should be equitably tolled on the ground that WMATA touted its internal procedure as the appropriate forum for resolving discrimination complaints, see Brief of Appellant at 10 15 and thereby lulled [him] .. into presuming that he had met the requirements of the law." Id. At 11. Although Washington asserts be more accurately characterized as one for equitable estoppel. See Currier, 1998 WL 785623 at *4. In either event, his claim fails. Washington is correct that the administrative filing requirement is "not a jurisdictional prerequisite to suit in federal court," and is therefore subject to equitable tolling. Zipes v. Trans World Airlines, Inc., 45 U.S. 385, 393 (1982). Washington is not entitled to tolling on either theory in this case, however for he has not adequately explained his failure to timely exhaust.

In Irwin v. Department of Veterans Affairs, the Supreme Court noted:

> We have allowed equitable tolling in situation where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filling deadline to pass. We have generally been much less forgiving in receiving late filling where e the claimant failed to exercise due diligence in preserving his legal rights.

498 U. S. 89, 96 (1990) footnotes omitted). Thus equitable principles favor tolling where, for example, a defendant engaged in "affirmative misconduct, "Baldwin County Welcome Ctr. V. Brown, 466 U.S. 147, 151 (1984), or misled [a plaintiff about the running of a limitation period." Bowden v United Sates, 106 F .3d 433, 438 (D.C. Cir 1997).

Here, Washington has demonstrated no affirmative misconduct on the part of WMATA. Nor has he shown that WMATA's decision letter disposing of his claim was misleading. Indeed, because 180 days had already expired between Washington's demotion and the date the letter was issued Washington could not have relied on the letter to his detriment. Moreover the letter's reference to the filing deadline was not literally incorrect, for it could have applied to an instance of discriminatory conduct arising after Washington's demotion. Finally, Washington, who was represented by counsel during at least part of the filing period, failed to demonstrate diligence; he filed his charge with the EEOC five months after receiving WMATA's decision letter and over a year after his demotion. "The court's equitable power to toll the statute of limitations will be exercised only in extraordinary and carefully circumscribed instances, " Smith-Haynie v. District of Columbia, 155 F. 3d 575, 579-80 (D.C. Cir 1998) (quotation omitted), and does" not extend to what is at best a garden variety claim of excusable neglect."

Irwin, 498 U.S. at 96. Thus, we find that equitable principles do not warrant tolling in this case.

Because our resolution of the timeliness issue disposes of Washington's ADEA and Title VII claims, we need not reach the question of whether his ADEA claim is nonetheless barred by the Eleventh Amendment. We note, however, that this issue is currently under advisement by this court in Jones v. WMATA, No. 97-7186 (D.C. Cir argued Sept. 9, 1998)

III. CONCLUSION

For the gorging reasons, we affirm the District Court's grant of summary judgement in favor of WMATA.

So ordered.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DIRSTRICT OF COLUMBIA CIRCUIT

No. 97-7227 **September Term, 1998**
97cv0026

Donald Washington,
Appellant

v.

Washington Metropolitan Area Transit Authority,
Appellee

BEFORE: Edwards, Chief Judge, Rogers and Garland , Circuit Judges

Upon consideration of appellant's petition for rehearing filed December 15, 1998, it is

ORDERED: that the petition be denied.

PER Cuuriam

FOR THE COURT:
Mark J. Langer, Clerk

BY:

Robert A. Bonner
Deputy Clerk

APPENDIX C

[Page 398-399]

TITLE 29—LABOR

CHAPTER XIV
EQUAL EMPLOYMENT OPPORTUNITY COMMISSON

Part 1691—PROCEDURES FOR COMPLANINTS OF EMPLOYMENT DISCRIMINATION FILE

Sec. 1691.13 DEFINITIONS.

As used in this regulation, the term:
(a) Agency means any Federal department or agency, which extends Federal financial assistance subject to any civil rights provision (s) which this regulation applies.
(b) Assistant Attorney General refers to the Assistant Attorney General, Civil Right Division, United States Department of Justice, o his or her delegate.
(c) Chairman of the EEOC refers to the Chairman of the Equal Employment Opportunity Commission, or his or her delegate.
(d) EEOC means the Equal Employment Opportunity Commission and where appropriate, any of its District Offices and its Washington Field Offices.
(e) Federal financial assistant includes:
(1) Grants and loans of Federal funds,
(2) The grant or donation of Federal property and interest in property,
(3) The detail of Federal personnel,
(4) The sale and lease of, and the permission to use (on other that casual or transient basis), Federal property or any interest in such property without consideration or at a nominal consideration, or at a consideration which is reduced for the purpose of assisting the recipient, or in recognition of the public interest to be served by such sale or lease to the recipient, and
(5) Any Federal agreement, arrangement, or other contract which has.

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One of its purpose the provision of assistance.

For purposes of this regulation, the term Federal financial assistance also includes funds disbursed under the revenue sharing act.
(f) Joint complaint means a complaint of employment discrimination covered by title VII or the Equal Pay Act and by title VI, title IX, or the revenue sharing act.
(g) Recipient means any State, political subdivision of any State or instrumentality of any State or political subdivision, any public or private agency, institution, organization, or other entity, or any individual, in any State, to whom Federal financial assistance is extended, directly or through another recipient, for any program including any successor, assign, or transferee thereof, but such program does not include any ultimate beneficiary under such program.
(h) Revenue sharing act refers to the State and Local Fiscal Assistant Act of 1972, as amended 31 U.S.C. 12221 ET seq.
(i) Tittle VI refers to the title VI of the Civil Rights Act of 1964, 4 U.S.C. 2000d-4. Where appropriate, title VI also refers to the extended that they prohibit employment discrimination on the grounds of race, color, religion, sex or national origin in programs receiving Federal financial assistance of the type subject to title VI itself as amended, 42 U. S.C. 2000e, et seq.
(k) Title IX refers to title IX of the Education Amendments of 197- 20 U.S. C. 1681 to 1683.
[48 FR 3574, Jan. 25, 1983, as amended at 54 FR 32063, Aug. 4, 1989]

[Page 395- 396]

TITLE 29—LABOR
Chapter XIV –
EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION

PART 1691
PROCEDURE FOR COMPLAINTS OF EMPLOYMENT
DISCRIMATION FILE

Sec. 1691.5 Agency processing of complaints of employment discriminate

(a) Within ten days of receipts of a complaint of employment discrimination, an agency shall notify the respondent that it has received a complaint of employment discrimination, including the date, place and circumstance of the alleged unlawful employment practice.
(b) Within thirty days of receipts of a complaint of employment discrimination an agency shall:
(1) Determine whether it has jurisdiction over the complaint under tittle VI, title IX, or the revenue sharing act; and
(2) Determine whether EEOC may have jurisdiction over the complainant under title VII or the Equal Pay Act.
(c) An agency shall transfer to EEOC a complaint of employment discrimination over which it does not have jurisdiction by over which EEOC may have

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Jurisdiction within thirty days of receipt of a complaint. At the same time the agency shall notify the complainant and the respondent of the transfer, the reason for the transfer, the location of the EEOC office to which the complaint was transferred and that the date the agency receive the complaint will be deemed the date it was received by EEOC.
(d) If an agency determines that a complaint of employment discrimination is a joint complaint, then the agency may refer the complaint to EEOC. The agency

need not consult with EEOC prior to such referral. Any agency referral of a joint complaint should occur within thirty days of receipt of the complaint.

(e) An agency shall refer to EEOC all joint complaints solely alleging employment discrimination against an individual. If any agency determines that special circumstances warrant its investigation of such a joint complaint, thin the agency shall determine whether the complaint ahas filled a similar charge of employment discrimination with EEOC.

(1) If an agency determines that the complaint has filed a similar charge of employment discrimination with EEOC, then the agency may investigate pending the agency investigation.

(2) If an agency determines that the complainant has not filed a similar charge of employment discrimination with EEOC, then agency may investigate the complaint if special circumstances warrant such action. In such cases, EEOC shall defer its investigation of the referred joint complaint pending the agency investigation.

(f) An agency shall not refer to EEOC a joint complaint alleging a pattern or practices of a recipient, an agency should absent special circumstances, handle the entire complaint under the agency 's own whether the complainant has filed a similar charge of employment discrimination with EEOC. If such a charge has been filed, the agency and EEOC shall coordinate their activities. Upon agency request, EEOC should ordinarily defer its investigation pending the agency investigation.

(h) When a joint complaint is referred to EEOC for investigation, the agency shall advise EEOC of the relevant civil right provision(s) applicable to the employment practices of the recipient, whether the agency wants to receive advance notice of any conciliation negotiation relationship between the alleged discrimination and the recipient, whether the agency wants EEOC to seek information concerning the relationship between the alleged discrimination and the recipient's whether a primary objective of the Federal financial assistance is to provide employment. The agency shall also notify the complainant and the complaint was referred, the identity of the civil rights provision (s) involved the authority of

EEOC under this regulation and that the date the agency receive the complaint will be deemed the date it was received by EEOC. Specifically, the notice shall inform the recipient that the agency has delegated to EEOC its investigative authority under implementing regulations. The agency, therefore, may use information obtained by EEOC under the agency's therefore, may use information obtained by EEOC under the agency's investigative authority in a subsequent tittle VI, title IX or revenue sharing act enforcement proceeding.

FTA Certifications and Assurance
for Federal Fiscal Year 1997

Name of Applicant:
Washington Metropolitan Area Transit Authority

Name and Relation of Authorized Representative
Richard A. White, General Manager

By Signing Below I Richard A. White (name), on behalf of the Applicant, declare that the Applicant has duty authorized me to make these certification and assurance and bind the Applicant's compliance Thus, the Applicant agrees to comply with all Federal statutes regulation executive orders, and administrative guidance required for each application it makes to the Federal Transit Administration (FTA) in Federal Fiscal Year 1997.

FTA intends that the certification and assurance the Application selection on the other side of this document, as representative of the certification and assurance in Appendix A. should apply as required to each project for which the Applicant seeks now or may later, seek FTA assistance during Federal Fiscal Year 1997.

The Applicants affirms the trustfulness and accuracy of the certification and assurance it has made in the statements submitted herein with is document and other submission made to FTA and acknowledges that the provision of the Program Fraud Civil Remedies Act of 1986, 31 US/C 38001 et seq., as implemented by U.S. Dot equation, "Program Fraud Civil Remedies. "49 CFR part 31 apply to any certification assurance or submission made in connection with the Urbanized Area Formula Program, 49 U.S.C 5307 and may apply to any other certification assurance or submission made in connection with any other program administered by FTA.

In signing this document, I declare under penalties of perjury that the foregoing certification and assurance any other statements made by me on behalf of the Application are true and correct.

Date: 10/31/96

a: s /Richard A. White
Authorized Representative of Application

AFFIRMATION OF APPLICANT'S ATTORNEY

For Washington Metropolitan Area Transit Authority
(Name of Applicant)

As the undersigned legal counsel for the above named Applicant, I hereby affirm that the Applicant has authority under sated and local law make and comply with the certification and assurance as indicated on the foregoing pages. I further affirm that, in my opinion, the certification and assurance have legally made and constitute legal and binding obligation on the Applicant.

I further affirm that to the best of my knowledge, there is no legislation or litigation pending or imminent that might adversely affect the validity of these certification and assurances, or the performance of the project. Furthermore, if I become aware of circumstances that change the accuracy of the foregoing statements I will notify the Applicant and FTA promptly.

Date: 10/31/96 b: s/Robert L. Polk
Applicant Attorney

Date: _____ c. Robert L. Polk

Unless the Applicant seeks only a FTA university and research-trapping grant authorized by 49 U.S.C. 5312 (b) the Applicant legal contract is required to affirm the legal capacity of the Applicant. The Attorney's Affirmation for previous FTA project is generally valid in Fiscal Year 1997, provided the Applicant's communication have not changed in a way that makes the certification invalid and the Attorney's Affiliation rename on file in the Applicant's office readily available to FTA. In these case line "b" should remain blank and same Authorized Representive alight "a" and "c". See Procedures in introduction section. Note: FTA however reserves the right to require an Attorney signature on line "b".

FTA Certification and Assurance for Fiscal Year 1997